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SL 9, p 38

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

THE CITY OF OMAHA, DOUGLAS COUNTY, NEBRASKA, A Municipal Corporation; ALVIN GRIGSBY: and JOHN FRIEND, Petitioners, vs. LU ANN BUFFKINS, Respondent.	NO. 90-1763 MOTION FOR LEAVE TO PROCEED INFORMA PAUPERIS

Lu Ann Buffkins, the Respondent, respectfully moves the Court for leave to proceed herein informa pauperis, in accordance with the provisions of Title 28, United States Code, Section 1915, and Rule 46 of this Court, and to file herein her response to the Petition for Writ of Certiorari filed by Petitioners in single counterpart, without printing the same.

Respondent applied for, and was granted by the Eighth Circuit Court of Appeals, leave to proceed therein informa pauperis.

The Affidavit of Respondent in support of this Motion is filed herewith.

DATED THIS 11 day of June, 1991.

RESPECTFULLY SUBMITTED,
LU ANN BUFFKINS, Respondent

BY: Robert V. Broom

Robert V. Broom #10444
Mary P. Clarkson #10701
BROOM, JOHNSON, FAHEY & CLARKSON
1722 St. Mary's Avenue
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Attorney for Respondent

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

THE CITY OF OMAHA, DOUGLAS COUNTY, NEBRASKA, A Municipal Corporation; ALVIN GRIGSBY: and JOHN FRIEND,	)	NO. 90-1763
Petitioners,	)	AFFIDAVIT OF LU ANN BUFFKINS IN SUPPORT OF MOTION TO PROCEED INFORMA PAUPERIS
vs.	)	
LU ANN BUFFKINS,	)	
Respondent.	)	

STATE OF NEBRASKA)
) ss:
COUNTY OF DOUGLAS)

Lu Ann Buffkins, being duly sworn on oath, deposes and says:

(1) She is the Respondent in the above-entitled proceeding and makes this Affidavit in support of her Motion for Leave to Proceed Informa Pauperis;

(2) Affiant is unable, because of her poverty, to pay fees and costs of this case or to pay the costs of printing required herein or give security therefore;

(3) Affiant is currently unemployed and dependent upon relatives for shelter and support;

(4) Affiant has not received within the past twelve months any income from a business, profession, or other form of self-employment or income in the form of rent payments, interest dividends or other sources;

(5) For the past several months, neither affiant's cash, checking or savings account balances have exceeded at any one time $100.00 and affiant owns no real estate, stocks, bonds, notes or other valuable property excluding ordinary household furnishings and clothing;

(6) Affiant owns a 1963 Chevrolet truck worth less than $400.00;

(7) Affiant currently owes over $6,000.00 in student loans and several thousand dollars in other debts.

FURTHER AFFIANT SAYETH NOT.

Dated this 11th day of June, 1991.

Lu Ann Buffkins

Subscribed and sworn to before me this 11th day of June, 1991.

GENERAL NOTARY-State of Nebraska
MANDY E. HAMON
My Comm. Exp. April 8, 1995

Notary Public

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

THE CITY OF OMAHA, DOUGLAS COUNTY, NEBRASKA, A Municipal Corporation; ALVIN GRIGSBY: and JOHN FRIEND,	)	NO. 90-1763
Petitioners,	)	
vs.	)	PROOF OF SERVICE
LU ANN BUFFKINS,	)	
Respondent.	)	

I, Robert V. Broom, a member of the Bar of the Supreme Court of the United States and counselor of record for Lu Ann Buffkins, Respondent herein, hereby certify that, pursuant to Rule 33, Rules of the Supreme Court, I served three (3) copies of the foregoing Motion to Proceed Informa Pauperis on each of the parties herein as follows:

The City of Omaha, Douglas County, Nebraska
Alvin Grigsby
John Friend

by delivering the copies thereof to James E. Fellows, Deputy City Attorney, counseler of record, and Thomas O. Mumgaard, Assistant City Attorney, 804 Omaha/Douglas Civic Center, 1819 Farnam Street, Omaha, NE 68183.

All parties required to be served have been served.

DATED THIS 11th day of June, 1991.

Robert V. Broom
BROOM, JOHNSON, FAHEY & CLARKSON
1722 St. Mary's Avenue
310 Flatiron Building
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(402) 346-8323
Attorney for Respondent

TABLE OF CONTENTS

	Page
Question Presented	ii
Table of Authorities	iii
Grounds in Opposition to Jurisdiction	1
Constitutional Provisions, Statutes, and Ordinances Involved in the Case	2
Statement of the Case	4
Argument	10
Conclusion	12
Certificate of Service	13

QUESTION PRESENTED

Whether the United States Court of Appeals for the Eighth Circuit's decision regarding the violation of Respondent's First Amendment rights by the Petitioners is in conflict with other appeals court or state supreme court decisions on the same issues or whether the Eighth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court.

TABLE OF AUTHORITIES

	Page
CASES:	
Buffkins v. City of Omaha, Douglas County, Neb., 922 F.2d 465 (8th Cir. 1990)	8,10
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)	10,12
Houston v. Hill, 482 U.S. 451 (1986)	11,12
CONSTITUTIONAL AMENDMENTS:	
First Amendment to the United States Constitution	2,9
Fourth Amendment to the United States Constitution	8
Fourteenth Amendment to the United States Constitution	2
OTHER AUTHORITIES:	
41 U.S.C. Section 1981	7,8
41 U.S.C. Section 1983	7
41 U.S.C. Section 1988	7
42 U.S.C. Section 1983	2
28 U.S.C.A. Section 1254(1)	1
28 U.S.C.A. Section 2101(c)	1
28 U.S.C.A. Section 2106	1
Municipal Code of Omaha, NE, Section 20-42	3,7,8
Supreme Court Rule 10	1

GROUNDS IN OPPOSITION TO JURISDICTION

The Petition for Writ of Certiorari is properly and timely filed pursuant to 28 U.S.C.A. Sections 1254(1), 2101(c) and 2106. However, no considerations, as defined by Rules of the Supreme Court 10, exist which justify examination of this case by the Court.

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED IN THE CASE

FIRST AMENDMENT TO THE CONSTITUTION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

SECTION 1 OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. Section 1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

SECTION 20-42 OF THE MUNICIPAL CODE OF OMAHA, NEBRASKA

Sec. 20-42. Disorderly conduct.

It shall be unlawful for any person purposely or knowingly to cause inconvenience, annoyance or alarm or create the risk thereof to any person by:

(a) Engaging in fighting, threatening or violent conduct; or

(b) Using abusive, threatening or other fighting language or gestures; or

(c) Making unreasonable noise.

STATEMENT OF THE CASE

THE FACTS

Unfortunately, Petitioners' Statement of the Case is, at best, incomplete and one-sided and, at worst, misleading. Accordingly, a more complete statement of the case is necessary.

Around noon on March 17, 1987, Omaha police heard from an informant that cocaine would be brought to Omaha by black individuals coming from Denver on a flight to arrive sometime before 5:00 p.m. In response to this tip, Petitioner Officers Grigsby and Friend went to Omaha Eppley Airport where they learned that several flights were scheduled to arrive after noon from Denver that day. By the time they reached the airport (around 2:30 p.m.), two afternoon flights had already landed, so they focused their attention on the remaining flight which was due to arrive at 3:40 p.m. In plain clothes, they began surveillance at the arrival gate. After the plane's late arrival, they saw only one black person exit, the Respondent LuAnn Buffkins. She was met by her sister, Hollis Buffkins, and, as they walked to the escalator area, they were joined by another sister named Cheryl Nwachakwu.

Nothing in the behavior of either Buffkins or her two sisters, other than a little pre-arrival nervousness by Hollis, aroused suspicion. The only factor identified by the police officers which they contend could possibly fit the "drug courier profile" was Buffkins' carrying a red Teddy bear. However,

contrary to the profile expectation, the Teddy bear was not taken from the airport when Hollis left her sisters at the escalator area and went to the parking garage. Rather, the bear stayed with Buffkins and Nwachakwu throughout the time they waited for luggage which Buffkins had checked -- an action also contrary to the drug courier profile. Furthermore, the Teddy Bear was bright red -- hardly the kind of "cover" one would expect a drug courier to use. Also contrary to the profile, Buffkins did not arrive on a plane in the early morning or late night hours and she was traveling in the rear rather than the forward portion of the plane and she carried a large piece of luggage and other carry-on items.

Despite these objective factors which allayed rather than aroused suspicion, the officers approached Respondent and her sister, identified themselves as officers conducting a narcotics investigation and requested her to allow them to search her luggage and ask her questions.

Buffkins questioned the need for the investigation and protested that their conduct was racist and unconstitutional. Nevertheless, the officers continued their questioning, picked up Buffkins's suitcases and escorted her and Nwachakwu to the security office. Nwachakwu was specifically told she was free to go but no such statement was ever made to Buffkins.

During the walk to the security room, one of the officers examined and felt the Teddy bear but found no indication of illegal content, thus dispelling the only possible remnant of suspicion.

In the security room, Buffkins provided identification and showed the officers her airplane tickets. The tickets had been prepaid, not purchased with cash, and showed a return flight several days later. Both of these factors were also inconsistent with the drug courier profile. Despite this, the questioning continued.

During the walk and also during conversations in the security room, Buffkins loudly protested the interrogation. Eventually the questioning was ended and Buffkins was told she was free to go. One of the officers told her to have a nice day and, as she picked up her luggage, turned away from the officer and exited the room, she replied either "asshole system" or "I will have a nice day, asshole". At that point, the officers decided to arrest her for disorderly conduct citing both her loud voice and attitude and her use of the word "asshole" as grounds for the arrest.

Once arrested, Buffkins was told that procedure required them to confiscate and inventory her luggage. She once again refused this and as an alternative, the officers allowed her

sister to open and inspect the suitcases in their presence. All agree no drugs or other contraband were contained in Buffkins' possessions.

THIS LAWSUIT

LuAnn Buffkins filed her Complaint in the United States District Court for the District of Nebraska against the City of Omaha and the two arresting officers, Alvin Grigsby and John Friend. Her Complaint was brought to enforce rights pursuant to 41 U.S.C., Sections 1981, 1983 and 1988 and pursuant to her rights under the First, Fourth and Fourteenth Amendments to the United States Constitution. She alleged that her detention and arrest was due to her race; that the detention violated her Fourth Amendment rights; that her arrest under the disorderly conduct ordinance was unconstitutional on its face in that it was based in part on Section (c) of the ordinance which had been declared unconstitutional by the United States District Court for the District of Nebraska, Chief Judge Lyle E. Strom (and not appealed by the City of Omaha); that her arrest was without probable cause; and that the ordinance was unconstitutional as applied to her.

THE DISTRICT COURT'S RULINGS:
AFFIRMATION OR REVERSAL BY THE APPEALS COURT.

Jury trial was held beginning August 29, 1989 and at the end of the Plaintiff's evidence, the trial judge dismissed the City of Omaha as a Defendant and dismissed Plaintiff's Section 1981 race discrimination claim. At the end of evidence, the trial judge denied the Plaintiff's motion for directed verdict that her initial stop and detention violated her Fourth Amendment rights. The court overruled Ms. Buffkins' motion for directed verdict against the City for the implementation and enforcement of an unconstitutional disorderly conduct ordinance and her motion for a directed verdict that her arrest was an unconstitutional application of the ordinance. The case was submitted to the jury which returned a verdict for the Defendants on all remaining claims. A motion for judgment notwithstanding the verdict on the Fourth and First Amendment claims and on objections to jury instructions (including an erroneous instruction on the qualified immunity defense which was given to the jury as opposed to being determined by the court), were also overruled.

The Eighth Circuit Court of Appeals affirmed the Court's finding with regard to the Section 1981 race claim but reversed on the First, Fourth and Fourteenth Amendment claims. The Eighth Circuit found that, as a matter of law, the police officers did not "possess any reasonable articulable suspicion to detain Buffkins . . . [and] the district court erred in directing a

verdict for the police officers on Buffkins' Fourth Amendment claim." Buffkins v. City of Omaha, Douglas County, Neb., 922 F.2d 465, 470 (8th Cir. 1990). As to the arrest itself, the Eighth Circuit found that the City should not have been dismissed because it had failed to repeal Subsection (c), the "unreasonable noise" section of the disorderly conduct ordinance which had been found in 1985 by the Nebraska Supreme Court to be "unconstitutionally suspect" and in 1989 had been specifically declared unconstitutional by the United States District Court for the District of Nebraska. The Eighth Circuit also found that as a matter of law, the arresting officers had no probable cause to arrest Buffkins for using a "fighting word". It is only on this last ruling, regarding the First Amendment violation, that Petitioners now seek a writ of certiorari for review by this Court.

ARGUMENT

Both sections of the Petitioners' Argument argue the same point: The Eighth Circuit's opinion was based on a notion that there is a "different fighting words doctrine" for police officers; that the speech being punished should be judged by the tolerance or self-control of the listener rather than a general "reasonable person" standard of likelihood to incite violence. Petitioners misread the grounds for the Eighth Circuit's opinion and are creating conflict where none exists.

Central to the Eighth Circuit's finding that Respondent should not have been arrested were the facts that Buffkins never became violent or threatened violence and no one outside the interview room heard her words. The officers agreed at trial that the words were said while Buffkins was physically turned away from them and on her way out the door. They said they felt no personal abuse and were not incited to retaliate physically because of her speech. This was the foundation for the Court's finding that "There is no evidence that Buffkins' speech was an incitement to immediate lawless action". Buffkins, supra at 472. This judgment is based on the Chaplinsky standard of words which are "likely to cause an average addressee to fight". Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942), cited in Buffkins, supra at 473. Once facts establish there is no likelihood of immediate lawless or violent action, the inquiry ends.

The Petitioners grossly mischaracterize the facts of this case when they describe what occurred as "calling a police officer an 'asshole' in an antagonistic, confrontational manner". (Pet. for Cert., p.14) By the time Respondent used the word "asshole", the confrontation, unlawfully created by the officers, was over. Buffkins was on her way out of the interrogation room. Indeed, she said it so softly that neither her sister nor Officer Grigsby even heard the full sentence. These facts repudiate Petitioners' hyperbolic description.

The Eighth Circuit's reference to the Houston v. Hill, 482 U.S. 451 (1986), comment about communications to police officers appears after its finding that violence was not imminent when Buffkins said "asshole" and was an additional factor which buttressed its finding. There was no application of a different standard for police officers; such was not necessary for the court's analysis. To the extent commentary on that aspect appears, it is as an addition to the essential analysis and supports the conclusion that the "asshole" comment is protected criticism of the police officers' prior unlawful conduct rather than personal abuse directed at them as individuals.

Petitioners make no effort to deal with the virtual unanimity of authority that the word "asshole" is not a fighting word. Rather, they focus on a supplemental factor noted by the Eighth Circuit as if the fact that two police officers were

involved was dispositive to the decision. The Petitioners spend thirteen pages of argument emphasizing and arguing a point that the Eighth Circuit noted in passing in less than a half page.

Even then, the Eighth Circuit notes specifically this Court's quote in Houston v. Hill, 482 U.S. 451, 462 (1986) in a manner clearly consistent with this Court's position. So, even if reliance on Houston v. Hill by the Eighth Circuit was somehow critical, it is consistent with Houston v. Hill -- and thus to grant certiorari would be clearly inappropriate.

CONCLUSION

This case is a logical and proper application of standards enunciated in Chaplinsky and its progeny. No conflict with other courts of appeals or state court decisions was created and it presents no unsettled or important issue which this Court needs to resolve.

DATED THIS 15th day of July, 1991.

LU ANN BUFFKINS,
Respondent

BY: Robert V. Broom

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Attorneys for Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon James E. Fellows, Deputy City Attorney, Counsel of Record, and Thomas O. Mumgaard, Asst. City Attorney, 804 Omaha/Douglas Civic Center, 1819 Farnam Street, Omaha, NE 68183, by U.S. First Class mail, postage prepaid, this 15th day of July, 1991.